not likely to be discouraged by sentences which do not involve loss of liberty.

If an immediate prison sentence is necessary, as I believe to be the case here, then it should be consistent with the duty to protect the interests of the public and to punish and deter the criminal. To use the words of Lawton L.J. in *Reg.* v. *Davies:*[2].

"the Courts have to make it clear that crime does not pay and the only way they can do so is by the length of sentences. Sentences show the court's disapproval, on behalf of the community, of particular types of criminal conduct."

In the instant case, Wong is a first offender. The sentencing court must realise, that when one speaks of deterrence that there are two aspects of deterrence. This is how it was put by Lawton L.J. in *Reg.* v. *Sargeant* [3]:

"There are two aspects of deterrence: deterrence of the offender and deterrence of likely offenders."

Looking at it from the point of view of individual deterrence, I find MacKenna J. saying this, in *Reg.* v. *Curran*[4]:

"As a general rule it is undesirable that a first sentence of immediate imprisonment should be very long, disproportionate to the gravity of the offence, and imposed... for reasons of general deterrence, that is as a warning to others. The length of a first sentence is more reasonably determined by considerations of individual deterrence."

Applying what has been said by MacKenna J. to an offender like Wong in the present case, the length of a first sentence of imprisonment is to be determined by considerations of individual deterrence. Looking at it from that point of view, I think that a sentence of 18 months' imprisonment for the first offence is proper. The fine of $200 is to remain undisturbed. In respect of the second offence, I think a concurrent sentence of two years' imprisonment in addition to the $300 fine is appropriate.

The appeal of the Public Prosecutor is, therefore, allowed.

Appeal allowed.

Solicitors: *Jagjit Singh & Co.*

BRUNEI REPORTS

VENNEL & ORS. v. PUBLIC PROSECUTOR

[C.A. (Sir Geoffrey Briggs, P., Sir Alan Huggins & Bewley J., Judicial Commissioners) November 22, 1984]

[Bandar Seri Begawan – Criminal Appeal No. 4 of 1984]

Criminal law and Procedure – House-breaking – Forgery – Dishonestly retaining stolen property – Sentence of imprisonment – Fine – Appeal against sentence – Demands of justice.

Upon arraignment the 2nd defendant pleaded guilty to two counts of house-breaking and one count of forgery. He was sentenced to 3½ years' imprisonment on each count concurrently. The 1st defendant pleaded guilty on the 5th day of the trial and was sentenced to 4 years' imprisonment on each count concurrently. The 3rd defendant pleaded guilty to the alternative offence of dishonestly retaining stolen property on the 2nd count. He was sentenced to 9 months' imprisonment and a fine of $10,000.00 or 3 months' imprisonment.

The 3rd defendant, aged 20, lost his employment as a result of the sentence of imprisonment. No evidence of his means appears to have been placed before the trial judge and the fine imposed was far beyond his ability to pay. The 3rd defendant is the younger brother of the 2nd defendant. They come from a good family. On behalf of the 1st and 2nd defendants it was submitted that greatly reduced terms would be appropriate.

Held, allowing the appeal: (1) as regards the 3rd defendant, it was wrong in principle to impose such a fine. Having regard to all the circumstances, the sentence imposed was greater than that which the justice of the case demanded. The sentence of 9 months' imprisonment was substituted with such term as would result in his immediate release;

(2) the sentences passed on the 1st and 2nd defendants are unnecessarily severe. Sentences by the trial judge substituted by sentences of 3 years and 2½ years respectively. to run from the date appointed by the trial judge.

Per Curiam: It is the duty of those advising the appellants to ensure that all necessary papers are placed before the Court of Appeal.

CRIMINAL APPEAL.

David Clidero for the appellant.

Ivan Leong (Deputy Public Prosecutor) for Public Prosecutor.

Sir Geoffrey Briggs, P: I will ask Sir Alan Huggins to deliver the judgment of the court.

Sir Alan Huggins J.A.: For convenience we will refer to the Applicants and the Appellant by the

numbers which were apparently assigned to them in the indictment.

We are concerned only with the sentences imposed on the Defendants. Upon arraignment the 2nd Defendant pleaded Guilty to two counts of house-breaking and one count of forgery. He was sentenced to 3½ years' imprisonment on each count concurrently. The 1st Defendant originally pleaded Not Guilty to the same three counts, but changed his pleas on the fifth day of the trial. He was sentenced to 4 years' imprisonment on each count concurrently. In relation to the 3rd Defendant, the Crown entered a *nolle prosequi* on the 1st Count: he pleaded Guilty to the alternative offence of dishonestly retaining stolen property on the 2nd Count and no evidence was offered against him on the 3rd Count. He was sentenced to 9 months' imprisonment and a fine of $10,000/- or 3 months' imprisonment.

Although we have an incomplete record, it would appear that the sentences were imposed on August 19, 1984, and that on August 27, all three Defendants filed notice of application for leave to appeal. We are informed that these applications came before Jackson-Lipkin, J., sitting as a single judge of this court, and that he granted leave to the 3rd Defendant, but refused leave to the 1st and 2nd Defendants. No notice of renewal of the applications of the 1st and 2nd Defendants was given until November 12, but no objection to the lateness of this notice was taken by the Crown.

We will deal first with the appeal of the 3rd Defendant. He is aged 20 years and lost his employment as a result of the sentence of imprisonment passed upon him. No evidence of his means appears to have been placed before the trial judge and we are told that the fine imposed was far beyond his ability to pay. That is not disputed by the Public Prosecutor and we have no hesitation in saying that it was wrong in principle to impose such a fine. That part of the sentence is therefore quashed.

The 3rd Defendant is the younger brother of the 2nd Defendant. They come from a good family and it is to be noted that their father has shown his care by attending the proceedings in this court. Unfortunately, these Defendants and their friend, the 1st Defendant, came into bad company and were much influenced by a man named Abdul bin Hai, who as a result of information given by them, has since been arrested, convicted and sentenced to a term of imprisonment. Abdul appears to have been the instigator of the house-breakings, but not to have been involved in the forgery. It is not a matter which we are entitled to take into account that the 2nd and 3rd Defendants are not Brunei citizens and are consequently liable to deportation, even though we are told that deportation is highly probable: this is a matter entirely within the discretion of the Executive. One other matter was drawn to our attention and this was not mentioned to the trial judge. Sometime ago the 3rd Defendant received a leg injury as a result of a hit and run accident and he has suffered pain therefrom.

Having regard to all the circumstances, we think the sentence imposed on the 3rd Defendant was greater than that which the justice of the case demanded and we allow his appeal. He has been in custody since July 19, 1984, and we substitute for the sentence of 9 months' imprisonment such term of imprisonment as will result in his immediate release.

Mr. Clidero acknowledges that, for the 1st and 2nd Defendants, substantial terms of imprisonment are inevitable, but he submits that greatly reduced terms would be appropriate. In addition to the matters already mentioned, he argues that the sentences were out of line with those imposed in comparable cases of house-breaking. He emphasized that the premises concerned were not residential premises. He suggests that the judge was wrong to differentiate between these two Defendants on the ground that the 1st Defendant had abused the confidence placed in him by his employer, whose cheque was the subject matter of the 3rd Count, but in our view the sentences cannot be faulted on that score. The pleas of both these Defendants indicate remorse and have saved public expense, though to a lesser extent in the case of the 1st Defendant. These Defendants appear to have been taking drugs and had also been drinking, although this was not a matter of mitigation.

We conclude that the sentences are unnecessarily severe. We give leave to the 1st and 2nd Defendants, we allow their appeals and substitute for the sentences imposed by the trial judge sentences of 3 years and 2½ years' imprisonment respectively, to run from the date appointed by the trial judge.

We add that it is the duty of those advising the appellants to ensure that all necessary papers are placed before the Court of Appeal. The papers originally put before us in this case did not include the notice of application for leave to appeal filed by the 1st and 2nd Defendants, the notice of appeal

of the 3rd Defendant, or the notice of renewal of the 1st and 2nd Defendants' application to the full court. The indictment has never been produced to us. The copy of the judge's note was incomplete and did not indicate that it was incomplete, save that it was obvious that a written outline of the facts and some confessions had been produced to the court and not included.

Appeal allowed.

Solicitors: *David Clidero & Co.*

ZULKIFLI BIN PUASA & ORS. v. PUBLIC PROSECUTOR

[C.A. (Sir Geoffrey Briggs, P., Sir Alan Huggins & Bewley J., Judicial Commissioners) November 28, 1984]

[Bandar Seri Begawan – Criminal Appeal No. 6 of 1984]

Criminal law and Procedure – Rape – Extension of time to appeal – Validity challenged – Question of sentence – Misunderstanding – Factors considered in extension of time.

The eight applicants were on September 12, 1984 convicted of rape and each was sentenced to eight years' imprisonment. On October 3, they filed an application for an extension of time within which to lodge an application for leave to appeal, time having expired on September 26. On October 4, the Chief Justice, as a single judge of this court, made an order extending the time and the application for leave duly came before the Court of Appeal, where the validity of the order was challenged by the Public Prosecutor.

Held: (1) it is not necessary or desirable that the Court should decide what in fact was said in the court below. The fact that there existed a possibility of misunderstanding justifies the Court in making an assumption that no application was made and therefore that there was no abandonment which could bar the present application;

(2) there are two factors to be considered upon an application for an extension of time, (1) the length of the delay and whether it can be satisfactorily explained and (2) whether the out of time application is likely to succeed;

(3) in view of the circumstances of the present case the applicants can have no justification for feeling aggrieved at receiving sentences of eight years' imprisonment. The order granting extension of time should be set aside and application for leave to appeal against sentence would be dismissed.

Cases referred to:

(1) *R.* v. *Rhodes* (1910) 5 Cr. App. R. 35.
(2) *R.* v. *Rigby* (1923) 17 Cr. App. R. 111.
(3) *Public Prosecutor* v. *Nasar bin Ahmad,* Bandar Seri Begawan Criminal Trial No. 15 of 1984 (unreported).

CRIMINAL APPEAL.

Ali Kawi for 1st, 2nd, 3rd, 5th, 6th, 7th & 8th appellants.

D.F. Abang Zen for 4th appellant.

Ivan Leong (Deputy Public Prosecutor) for Public Prosecutor.

Cur. Adv. Vult.

Sir Alan Huggins J.A.: The eight Applicants were on September 12, 1984 convicted of rape and each was sentenced to eight years' imprisonment. On October 3, they filed an application for an extension of time within which to lodge an application for leave to appeal, time having expired on September 26. On October 4, the Chief Justice, as a single judge of this court, made an order extending the time and the application for leave duly came before us.

The Public Prosecutor, as a preliminary issue, challenged the validity of the Chief Justice's order. First, he alleged that there had been a previous application for leave to appeal, that that application had been abandoned and that no further application could be entertained. Secondly, he submitted in the alternative that, the order extending the time having been made in the absence of the parties and there being no sufficient ground for the making of the order, it should be set aside *ex debito justitiae.*

The first argument was based upon what happened in the lower court immediately after sentence had been passed. The Public Prosecutor asserts that counsel for the Defendants applied to the judge for leave to appeal and that, after a short adjournment at the instance of the judge for counsel to confirm that they wished to appeal, counsel indicated that the Defendants did not wish to appeal, and the application for leave was withdrawn. Initially it was argued that the appeal was thereupon deemed to have been dismissed under rule 51 of the Brunei Court of Appeal Rules. However, when it was pointed out that rule 51 related to cases where an appeal was abandoned by notice in writing in the prescribed form and that no such notice had been given here, the Public Prosecutor based his argument solely on the common law: he submitted that an abandonment in the face of the court was an invitation to the court to dismiss the appeal and that, unless and until the abandonment was, for good reason, allowed to be withdrawn,